COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC	)	
v.	)	
VERIZON NEW ENGLAND, f/k/a NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	)	Docket No. 03-56
And	)	
NORTHEAST UTILITIES SERVICE COMPANY, d/b/a WESTERN MASSACHUSETTS ELECTRIC COMPANY	)	
And	)	
MASSACHUSETTS ELECTRIC COMPANY	)	

ANSWER OF
VERIZON MASSACHUSETTS

Pursuant to 220 CMR §45.03(4), Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") files this Answer to the so-called Amended Complaint and Petition for Declaratory Relief ("the Complaint") filed with the Department on May 14, 2003, by Fiber Technologies Networks ("Fibertech").

I. INTRODUCTION AND SUMMARY

This is the second time Fibertech has sought to invoke the pole attachment enforcement procedures under 220 CMR §45.00 in an effort to deflect attention from Fibertech's illegal conduct in installing unauthorized attachments on approximately 700

poles jointly owned by Verizon MA in Western Massachusetts. Although Fibertech asserts in the Complaint that Verizon MA's alleged misdeeds extend back to 2000, Fibertech never sought the Department's intervention in Verizon MA's pole or conduit licensing processes until August of 2002, just days after Verizon MA sued Fibertech in state court to recover for Fibertech's illegal attachments.[1] The Department dismissed Fibertech's petition without prejudice by order dated December 24, 2002. Fibertech moved for reconsideration (which Verizon MA opposed) but then sat on its alleged rights for another five months before filing the instant Complaint on May 14.[2]

The Complaint is simply a smoke screen to obscure Fibertech's illegal conduct. Fibertech intentionally installed its plant on Verizon MA's poles without right. The construction itself was poorly done and resulted in hundreds of unsafe and hazardous conditions on the poles. The Massachusetts Superior Court has found that Fibertech installed those attachments wrongfully and in bad faith in an intentional attempt to thwart Verizon MA's legal rights. The Complaint, however, offers only transparent *ex post facto*

[1] *See* Verizon MA's Complaint filed with the court on August 5, 2002 and the accompanying affidavits of Carol J. Leone, Robert Kerwood and Keefe B. Clemons, which are filed herewith at Tab 1 of the Appendix of Verizon Massachusetts ("App."). *See also,* Fibertech's "Petition for Interim Relief and Complaint" filed in Docket No. 02-47 on August 13, 2002.

[2] Like Fibertech's Petition of August, 2002, this Complaint is fatally flawed and should be dismissed, with prejudice. As a matter of law and policy, Fibertech should not be allowed to attack the terms and conditions of the License Agreements after having unlawfully installed its attachments on the poles at issue. Allowing Fibertech to proceed here would encourage every would-be attacher to imitate Fibertech – i.e. engage in self help, install their attachments as they see fit with no notice to the pole owners and then, if caught, dispute the pole owner's bill for make-ready work. Such a result would destroy Verizon MA's ability to administer the poles for the fair use of all and lead to chaos on the poles. It would also abrogate the requirement of a license that lies at the core of the Aerial License Agreements between Verizon MA and its licensees, and it would do so without any determination by the Department that such requirement is not just and reasonable. Moreover, because Fibertech has not obtained grants of locations from the relevant municipalities for the vast majority of its attachments, it is not a "licensee" under the Pole Attachment Statute. Consequently, it has no standing to assert the claims in the Complaint, and the Department has no jurisdiction to hear them. For these reasons, Verizon MA is filing herewith a Motion to Dismiss the Complaint.

rationalizations for Fibertech's misconduct. Like its predecessor, the Complaint rests largely on gross general allegations about Verizon MA's conduct regarding access to poles and conduit, as well as mischaracterizations of fact and law.

Moreover, the few concrete allegations in the Complaint which assert specific instances of an unreasonable practice or charge by Verizon MA are demonstrably false. Contrary to Fibertech's allegations, the make-ready work Verizon MA has performed on the poles at issue was necessary to bring Fibertech's unsafe and unlawful attachments into compliance with the relevant safety and construction codes and standards. While some of that work had been noted in the make-ready estimates Verizon MA had provided to Fibertech before the attachments were installed, much of the work was made necessary because Fibertech installed its attachments before the make ready work had been performed and did so in a hurry, using slip-shod construction techniques. Likewise, the delays in the licensing process of which Fibertech complains were invariably of its own making, due to its inability and/or unwillingness to make decisions or comply with the reasonable, established process established by the Aerial License Agreements.

II. THE FACTS

In order to respond fully to the allegations of the Complaint, Verizon first states the relevant facts, as follows.

A. The Aerial License Agreements.

On or about March 7, 2000, Verizon MA entered into an Aerial License Agreement with Fibertech's predecessor, Fiber Systems, L.L.C., that established the terms and conditions under which Verizon MA agreed to allow Fibertech to place and maintain

attachments on Verizon MA's poles. *See* App. Tab 1, Clemons Aff., Exhibit A. On or about March 31, 2000, Verizon MA and Western Massachusetts Electric Company ("WMECO") entered into a second Aerial License Agreement with Fibertech that established the terms and conditions under which Fibertech would be permitted to place and maintain attachments on telephone poles owned jointly by Verizon MA and WMECO. *Id*., Exhibit B. The relevant provisions of these License Agreements are substantially identical.

Pursuant to the License Agreements, Fibertech was obligated to apply for and have received a license from Verizon MA and WMECO prior to placing any attachments. *See* License Agreements, Article VII(A). Before any license would be issued to Fibertech to attach to a particular pole, the parties were required to perform a joint field survey to determine the adequacy of the pole to accommodate the proposed attachments, to determine what, if any, make-ready work was required to prepare the pole for the attachment and to provide the basis for estimating the cost of the work. *See* License Agreements, Articles I(E) and (F), VIII(A). If Verizon MA determined, as a result of the joint field survey, that make-ready work was required, it would notify Fibertech of the estimated cost of the work. *See* License Agreements, Article VIII(C). Fibertech was required to pay for the make-ready work before Verizon MA would perform the work. *See* License Agreements, Articles IV(A).

Fibertech was required to place and maintain all proposed attachments in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures ("Blue Book"), Electric Company Standards, the National Electrical Code ("NEC"), the National Electrical Safety Code ("NESC") and rules and regulations of the Occupational Safety and Health Act ("OSHA") or any governing authority having jurisdiction over the subject matter. *See* License Agreements, Article V(A). The

Agreements also obligated Fibertech to construct any approved attachments in a safe condition and in a manner acceptable to Verizon MA. Verizon MA reserved the right to make periodic inspections of Fibertech's attachments at Fibertech's expense. *See* License Agreements, Articles IX(A) and XI(A).

In addition to obtaining the licenses from Verizon MA, Fibertech agreed to obtain from the relevant municipalities any required authorization to construct, operate or maintain its attachments on public property and was required to submit evidence of such authority to Verizon MA before making any attachments. *See* License Agreements, Article VI(A). Fibertech also agreed to "comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreements]." *See* License Agreements, Article VI(C).

From 2000 to the filing of the Superior Court suit, Verizon MA worked closely with Fibertech, advising the company of the steps necessary to secure its requested pole attachment licenses. *See* App. Tab 1, Leone Aff., at ¶10. Almost from the beginning, Fibertech has been unwilling or slow to comply with the licensing requirements. *Id.*, at ¶ 11. Instead of following the licensing requirements set forth in the applicable agreements, Fibertech spent a substantial amount of time and energy objecting to those requirements. *Id.* The disarray with Fibertech's business and its unwillingness to follow documented processes for gaining access to Verizon MA's poles and conduit lie at the root of its problems.

Some of the conduct that delayed Fibertech obtaining licenses were: incomplete and erroneous applications; regular changes in the scope of Fibertech's network affecting the routing of pole and conduit routes; failure to assign sufficient personnel to projects so that necessary steps in the process could be completed in a timely manner, such as field surveys;

repeated changes in project managers; failure to pay or delays in paying field survey and make-ready charges; failure to respond to Verizon MA's efforts to schedule field surveys; requests for multiple field surveys; cancellation of project management meetings; and placing applications on hold for indefinite periods. Indeed, a Fibertech manager even felt the need to apologize to his Verizon MA contact for "the runaround you have received from our Company" noting the confusion at Fibertech caused by the repeated turn-over of project managers at the company. *See* App. Tab 2. Thus, the delays Fibertech encountered in the licensing process were largely attributable to Fibertech's unwillingness or inability to comply with its obligations in connection with that process. Leone Aff., at ¶¶12-15.

B. Fibertech's Illegal Conduct

In late June of 2002, Verizon MA discovered that Fibertech had unlawfully placed its fiber facilities on nearly 700 Verizon MA poles in Agawam, Easthampton, Northampton, and Springfield by failing to obtain licenses for such attachments from Verizon MA and by installing its plant before required make-ready work had been performed. Fibertech gave Verizon MA no advance notice that it intended to install its attachments without a license, nor did it assert to Verizon MA that it had any right to do so. Fibertech's conduct constitutes trespass, breach of the parties' Aerial License Agreements and violation of G.L. Chapter 166, §35. In many instances, Fibertech placed these illegal attachments in an unsafe manner that jeopardized the safety of Verizon MA employees, the employees of other companies who attach to the poles, and the general public.

Fibertech not only ignored Verizon MA's and WMECO's rights, but it also ignored the rights of cities and towns by failing to obtain municipal permits for placing its facilities on public ways, as required by Massachusetts law. In Agawam, Easthampton, Northhampton

and West Springfield, Fibertech didn't bother to obtain the required grants of locations for its attachments.[3] *See* Supplemental Affidavit of Carol J. Leone, filed herewith as App. Tab 3, ¶11. Indeed, Fibertech had not even applied for grants of locations from some of these municipalities, including Easthampton and Northampton. As noted by the Mayor of Easthampton at the time, Fibertech just "just blew in and blew out" of town with its attachments. *See* Leone Aff., ¶18 and Exhibit A thereto, included in App. Tab 1. To date, almost a year after Fibertech installed its illegal attachments, it still has failed to obtain municipal permits for its facilities in these municipalities. Supplemental Leone Aff., ¶11. Fibertech's failure to obtain proper municipal authority for its attachments is a further violation of the Agreements, Article VI(A).

Verizon MA repeatedly notified Fibertech that its unlawful attachments constituted a material breach of its License Agreements and that it must remove them to prevent termination of those Agreements in accordance with their terms. Fibertech nevertheless disavowed any wrongdoing and failed to take any action to cure its extensive violations. Consequently, to enforce its rights under the License Agreements and prevent Fibertech from making further unlawful and potentially unsafe attachments, Verizon MA filed suit against Fibertech in the Superior Court of Hampden County on August 8, 2002, seeking among other things injunctive relief requiring Fibertech to cease any further unauthorized attachments and to remove its unlawful attachments from Verizon MA's poles. *See* App. Tab 1. The other Respondents herein filed similar suits against Fibertech.

[3] Verizon MA is investigating whether Fibertech has received, to date, any grants of locations for the 47 Verizon MA poles to which it has attached in the City of Springfield.

C. The Injunction Against Fibertech

On August 19, 2002, the Superior Court entered an order granting Verizon MA and WMECO a preliminary injunction that (1) prohibits Fibertech from making any further attachments to any poles owned by Verizon or jointly-owned by Verizon and WMECO without express written authorization, and (2) required Fibertech to remove within 45 days all attachments of any kind on all poles owned by Verizon MA and WMECO for which it does not have a license *or* pay $400,000 to be used by Verizon MA and WMECO to correct unsafe conditions on poles. A copy of the Court's order is App. Tab 4.

In its analysis, the court also rejected Fibertech's argument (which also underpins the Complaint in the instant proceeding) that it had a right to place its attachments without a license because Verizon MA and WMECO allegedly delayed licensing the poles. The Court noted that Fibertech's claim was not supported by the terms of the License Agreements, *id*. at 4-5, by "any appellate case or any decision of any administrative body in this Commonwealth or in any other state" or by "any decision by any Federal court." *Id.*, at 3. In fact, the Court noted that the only case Fibertech cited as authority for its claim, *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 F.C.C.R. 9563, 2000 WL-1060425 (FCC), actually supported Verizon MA's and WMECO's position. *Id.*, at 5. Accordingly, the court held that:

> [T]here is no authority whatsoever for the proposition that the mere lapse of time automatically entitles an applicant to make attachments to poles or to decide unilaterally what make ready work is required to insure that attachments may be made safely.
>
> The Court concludes, therefore, that Fibertech has made attachments to plaintiffs' poles without right to do so and is therefore committing a continuing trespass with respect to each such pole. Plaintiffs, consequently, have established a very strong likelihood of success on

> their claims that Fibertech had no right to make attachments when it did and no right presently to these attachments on Plaintiffs' poles.

Id., at 5-6. Thus, no delay by Verizon MA or WMECO (had there been any) in processing Fibertech's applications would have given Fibertech the right to attach to the poles without a license. The Court further found that Fibertech acted in bad faith, as follows:

> Fibertech . . . was not acting in good faith when it resorted to self help. As previously noted, there was no legal authority anywhere supporting Fibertech's resort to self help under these circumstances. Furthermore, although some of Fibertech's applications had been pending for over two years, Fibertech never sought the assistance of the DTE or of a court of law . . . before resorting to self help. Nothing in the record before the Court explains why Fibertech could not have taken its dispute to court or to the DTE before resorting to self help, or why Fibertech failed to advise plaintiffs of its intentions before erecting the attachments. The Court infers from this record that Fibertech deliberately resorted to self help, before instituting proceedings at the DTE and before advising Plaintiffs of its intention to make attachments, in order to present Plaintiffs and the DTE or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs.

Id., at 8. Thus, the court also found that, "it is very clear that Fibertech acted wrongfully in erecting the attachments *and did so to obtain an inappropriate tactical advantage in litigation it knew was forthcoming*." *Id.*, at 9 (emphasis added).

Fibertech subsequently moved for reconsideration of the court's order, which motion was denied.

Following the court's order, Fibertech deposited $400,000 with Verizon MA, and Verizon MA and WMECO performed substantial work to correct the widespread safety violations Fibertech had created on the poles at issue. To date, the cost of that work exceeds the amount deposited by Fibertech. Supplemental Leone Aff. ¶ 12.

D. Fibertech's First Complaint to the Department

In retaliation for Verizon MA's and WMECO's suits to enforce their rights under the Agreements, Fibertech filed a "Petition for Interim Relief and Complaint" with the Department on August 13, 2002. By order dated December 24, 2002, the Department dismissed that Petition without prejudice, on three grounds. First, the Department found that the Petition failed to meet the pleading requirements of 220 C.M.R. 45.02, which mandates that a complaint "identify specific poles to which access had been denied or effectively denied, or must identify specific attachment rates, terms, or conditions claimed not to be just and reasonable." Order of Dismissal Without Prejudice, at 4. Fibertech's Petition and supporting documents failed to "form a clear and concise statement of *which* poles are in dispute, or *which* rates, terms, or conditions [of attachment] are being challenged." *Id*. at 5 (emphasis in original). Second, the Department held that under any statement of facts, it cannot grant the generalized relief requested by Fibertech. Finally, the Department found that the injunction entered by the Superior Court rendered Fibertech's requests for injunctive relief moot. *Id*. at 6. Fibertech moved for reconsideration of the Department's decision, which Verizon MA opposed. That motion is now moot as a result of the filing of the instant Complaint.

E. Fibertech's Unlawful Conduct in Rhode Island

Although the Superior Court enjoined Fibertech from installing any further attachments on Verizon's poles without the express written authorization of Verizon, WMECO or the court, Fibertech has simply moved its unlawful conduct out of state. In or about late February of 2003, Verizon RI discovered that Fibertech had placed unauthorized attachments on approximately 1,065 poles jointly owned by Verizon and the local power

company in nine cities and towns in Rhode Island. Supplemental Leone Aff., ¶18. Fibertech had received licenses for most, but not all, of the poles from the power company, but *Verizon had not issued licenses for any of these poles*. As it did in Massachusetts, Fibertech installed its attachments before required make-ready work had been performed on many of the poles. *Id*. Also as it did in Massachusetts, Fibertech failed to give Verizon any advance warning that it intended to install its attachments without licenses from Verizon. Nor did Fibertech inform Verizon, after the fact, that it had attached to those poles. *Id.* Not surprisingly, Fibertech also failed to obtain permits for its attachments from many of the relevant Rhode Island towns. *Id.* Verizon notified Fibertech, in writing, of its breaches of the relevant agreement and asked Fibertech to take a series of specific steps in order to cure the breach and allow Verizon to license the attachments. In response, Fibertech filed a Petition with the Federal Communications Commission seeking to enjoin Verizon from removing the unlawful attachments. Verizon has no intention of taking such action, but has filed suit in Rhode Island state court for damages and injunctive and declaratory relief. *Id.*

III. VERIZON MA'S ANSWERS TO THE NUMBERED PARAGRAPHS OF THE COMPLAINT

Verizon MA responds to the numbered paragraphs of the Complaint as follows:

1. Verizon MA admits that it owns poles and conduits to which Fibertech has sought to attach its fiber cables. The final sentence of this paragraph of the Complaint sets forth a legal conclusion to which no response is necessary.

2. Verizon MA denies the allegations contained in this paragraph of the Complaint. Verizon MA denies that it has obstructed Fibertech's legal efforts in any way or engaged in any anticompetitive conduct, and further denies that the terms and conditions of

the Arial License Agreements are unjust or unreasonable. Verizon MA further denies that its enforcement of a fair, orderly and reasonable licensing process is part of any strategy to "protect the utilities' joint monopoly over the telecommunications marketplace" and denies any such strategy. Any delays experienced by Fibertech in obtaining licenses to use Verizon MA's poles or conduit were of its own making, arising from Fibertech's inability or unwillingness to meet its obligations under the Agreements, as detailed above. Fibertech also caused delays in the following ways: submitting incomplete aerial licensing applications, submitting single applications covering poles in multiple municipalities, failing to provide representatives to participate in joint field surveys, failing to object to decisions as to make-ready work during field surveys but belatedly objecting only after Verizon MA provided make-ready estimates, obtaining extensions of time in which to submit make-ready payments only to keep an application pending with no intent to make the payments, paying one pole owner but not the other to perform make-ready work, and continually revising its proposed routes and the desired priority of its applications. *See* Supplemental Leone Aff. ¶5.

3. Verizon MA denies the allegations contained in this paragraph of the Complaint. Further answering, Verizon MA states that Fibertech consistently failed and refused to abide by Verizon MA's established processes for licensing poles and conduits in Massachusetts, as set forth in the Aerial License Agreements and the Conduit Licensing Agreement executed by Fibertech. Verizon MA also denies that its "responses to Fibertech's initial pole applications were provided between 169 and 360 days after submission of the applications." In fact, Verizon initially responded to each of Fibertech's initial applications *the day after they were filed*. *See* Supplemental Leone Aff., ¶7.

4. Denied. Verizon MA denies that it has required Fibertech to pay to replace poles that were able to accommodate Fibertech's attachments or pay to correct pre-existing violations on poles which, had they been properly installed, would not have required make-ready work by Fibertech. Verizon MA admits that it prohibited Fibertech from boxing most poles, although Fibertech is well aware that Verizon MA allows boxing in certain limited cases. Verizon MA admits that it sought to enforce the National Electric Safety Code and other relevant construction codes with respect to Fibertech, but denies that it enforced such codes in a discriminatory manner. To the extent that Verizon refused to allow Fibertech to ignore the dictates of these codes, such enforcement was more than justified by Fibertech's demonstrated illegal conduct, trespass and pervasive and consistent violation of such codes on the vast majority of the approximately 700 poles it attached to without right.

5. Verizon MA denies the allegations contained in this paragraph of the Complaint. Fibertech fails to specify which "applications" it is referring to in this paragraph.[4] Verizon MA admits that pursuant to the Aerial License Agreement, Fibertech agreed that if poles included in an application require make-ready work, such work must be performed before Verizon MA will issue a license on that application. To the extent Fibertech is claiming that Verizon MA is required to issue licenses for individual poles which require no make-ready work even though other poles included in the same application do require such work, Verizon MA denies that allegation. Verizon MA states, further, that such a rule is contrary to the terms of the License Agreements and would be unreasonable,

[4] Fibertech's allegations regarding unspecified "applications" are so vague as to be almost meaningless. For example, with respect to the claim in paragraph 5, Verizon has issued many licenses to Fibertech without charging any make-ready work at all. Supplemental Leone Aff. ¶6. Based on Verizon MA's understanding of the poles to which Fibertech has attached in the Springfield area, those poles were covered by 16 license applications by Fibertech to Verizon MA, four of which Verizon MA had granted and twelve of which had not been granted at the time Fibertech attached.

impossible to administer in a way fair to all license applicants and would have conferred no benefit on Fibertech here, in that Fibertech could not, as a practical matter, install attachments to only those poles in an application that require no make-ready work, say poles 1, 3 and 5 on a given street, while skipping those poles that do require such work, say poles 2 and 4.

6. Verizon MA denies that it charged Fibertech any unlawful make-ready costs. Verizon MA has not calculated the average per-mile cost of the make-ready estimates it issued to Fibertech for the Springfield area, and thus lacks sufficient information either to admit or deny the allegations contained in this paragraph. Verizon MA states that the make-ready estimates it provided to Fibertech for the poles at issue here were reasonable and necessary based on the conditions of the poles and the pre-existing attachments.

7. Verizon MA denies that it caused anything more than nominal delays in the processing of Fibertech's applications for poles in the Springfield area. Verizon MA lacks sufficient information about Fibertech's finances or revenue projections either to admit or deny the remaining allegations in this paragraph.

8. Verizon MA denies that it forced Fibertech to downsize its network and that it has employed "exclusionary practices" in Massachusetts. Verizon lacks sufficient information either to admit or deny the remaining allegations in this paragraph.

9. Verizon MA denies that the conduit licensing process which Fibertech agreed to in its Conduit Licensing Agreement is unjust or unreasonable and further denies that it has delayed Fibertech's conduit license applications. Although Fibertech fails to specify in any way the particular conduit applications which it alleges Verizon MA did not respond to in timely fashion, Verizon MA denies such allegation and states that it responded to Fibertech's

conduit license applications within 45 days of submission. Verizon MA further denies that it required Fibertech to specify the route it wished to occupy or refused to provide Fibertech with plats and other information regarding conduit capacity. In fact, Verizon MA's conduit applications expressly inform the applicant that it may choose to specify only the endpoints it wished to connect and Verizon MA would design an appropriate route. Fibertech, however, never availed itself of this service. Verizon makes available its plats, maps and similar information showing locations of underground cables to any applicant who requests such information.

10. Verizon MA lacks information sufficient to admit or deny the allegations concerning the amount of survey and make-ready fees paid by Fibertech to other utilities. Verizon denies that Fibertech paid it $155,000 for make-ready work in the Springfield area. Verizon MA denies that Fibertech was not expressly authorized to attach to any poles in the Springfield area at the time it installed its unauthorized attachments. Verizon MA further denies that it refused to issue any further pole licenses to Fibertech unless it paid $74,000 in additional make ready estimates. Verizon MA issues licenses by application, so that a refusal by Fibertech to pay the make-ready estimate for a given application would not, and did not, prevent Verizon MA from issuing licenses which were otherwise appropriate to issue. Indeed, in the months before Fibertech trespassed and illegally installed its attachments, Verizon MA had issued licenses to Fibertech on four of the sixteen applications at issue here, covering 46 poles. *See* Chart at Leone Aff. ¶16. Moreover, *Fibertech had asked Verizon MA not to complete work* on six of the remaining twelve applications, representing 357 poles. *Id*. In addition, Fibertech had paid the make-ready estimates for another four applications, covering another 262 poles, and Verizon MA was in the process of performing the relevant

make-ready work for those applications. *Id*. The remaining 39 poles were covered by two applications for which Verizon had issued make-ready estimates two months before -- on April 23, 2002 – and was awaiting payment from Fibertech. *Id*.

11. Verizon MA lacks sufficient information regarding Fibertech's agreements with its alleged customer and the source of Fibertech's funding either to admit or deny the allegations contained in the first sentence of this paragraph, and Verizon MA calls upon Fibertech to prove same. Verizon MA denies that Fibertech had any lawful justification for installing it attachments on Verizon MA's poles without its consent or knowledge, and notes that the Superior Court has found that Fibertech had none.

Verizon MA further denies that Fibertech installed its unauthorized attachments "in a safe manner consistent with industry standards." Fibertech's installation violated numerous requirements of the relevant safety codes and construction standards. For example, Fibertech failed to ground its installation as required by such authorities. Fibertech did not utilize guying to reduce pole stress caused by the installation of high-tension wires. Additionally, Fibertech violated the NESC distance requirements by installing its cables in within 40 inches (measured vertically) of electrical wires in the supply space, and within 12 inches of cable in the communications space. Fibertech also installed its cable under high-tension, yielding little sag in the cable and causing many, many violations of the NESC mid-span distance requirement of 30 inches. Fibertech's violations created a serious risk of energizing communications lines and posing a potentially life-threatening hazard for technicians working on and around the poles. In some instances, Fibertech installed extension arms in violation of the utilities' well-known requirements, and using lag-bolts. Some of these four-inch bolts were not even fully installed, leaving that extension arm loose on the poles.

Fibertech has "boxed-in" some poles, making pole replacement more difficult and expensive and preventing access by other pole users to their facilities. Fibertech also created "mid-span crossovers" by attaching lines that run both above and below the lines of other users creating further risk of damage to the facilities of other users and increasing the likelihood of causing communications lines to become energized with high voltage electricity from the power lines of the electric company. Moreover, Fibertech installed its lines to CATV through-bolts, crushing the cable in some instances, and creating a further barrier for CATV technicians to access the CATV cable. Finally, Fibertech placed attachments on old, deteriorated poles that cannot safely accommodate Fibertech's high-tension attachments. *See* App. Tab 1, Kerwood Aff. at ¶¶ 15-21; Supplemental Leone Aff. ¶10.

Verizon MA further denies Fibertech's disingenuous claims that it used lag bolts "to accommodate the performance of additional make-ready work," thereby "leaving open the questions of make-ready work and cost allocations for resolution by the parties or the Department." Fibertech used lag bolts because it was cheap and easy, and allowed Fibertech to install its cable quickly, under cover of darkness, before Verizon MA could find out about it. That Fibertech had absolutely no intention of "leaving open" any issues of make-ready work is clear from its conduct. Fibertech gave Verizon MA no advance notice (1) that it felt that it was entitled to install its attachments without a license; or (2) that it intended to install its attachments without a license. To this day, Fibertech has offered no reason why it could not have so informed Verizon MA. Further, although Fibertech now claims that Verizon MA has been delaying its applications for years, Fibertech never saw fit to bring that alleged claim to the Department or to court before it took matters into its own hands. Even after it had installed its unauthorized attachments, Fibertech *still* failed to bring its claims to the

Department until after Verizon MA caught Fibertech and sued it to recover the cost of the make-ready work, among other things. This is hardly the conduct of a party who is only looking for a fair and "open" determination of a dispute. Rather, as the Superior Court found:

> Fibertech . . . was not acting in good faith when it resorted to self help. As previously noted, there was no legal authority anywhere supporting Fibertech's resort to self help under these circumstances. . . . Nothing in the record before the Court explains why Fibertech could not have taken its dispute to court or to the DTE before resorting to self help, or why Fibertech failed to advise plaintiffs of its intentions before erecting the attachments. The Court infers from this record that Fibertech deliberately resorted to self help, before instituting proceedings at the DTE and before advising Plaintiffs of its intention to make attachments, *in order to present Plaintiffs and the DTE or a court of law with a fait accompli;* thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs.

App. Tab 4, at 8 (emphasis added).

Finally, Verizon MA denies that it has willingly approved the temporary use of lag-bolted extension arms in order to attach facilities prior to performance of make-ready work in New York. Also, as shown above, Fibertech did not intend for its unauthorized construction in Massachusetts to be temporary.

12. Verizon MA denies that Fibertech made a meaningful disclosure of its unlawful activity to Verizon MA on June 22, 2002. Specifically, Fibertech did not inform Verizon MA of the massive scope of its unlawful construction, that it was done intentionally or that Fibertech had caused hundreds of safety hazards on the poles. At the time, unaware of these material facts, Verizon expressed a willingness, consistent with its usual practice, to attempt to resolve the problem informally in a businesslike manner. Upon learning of the

true nature of Fibertech's unlawful conduct, Verizon MA notified Fibertech of its breaches and demanded a cure. Fibertech's refusal to enact a cure, or even acknowledge fault, left Verizon MA with no recourse but to bring suit to enforce the Aerial License Agreements. Verizon MA admits that the court issued an injunction ordering Fibertech to remove its facilities or deposit $400,000 with Verizon MA. Verizon MA denies the remaining allegations contained in this paragraph.

13. Verizon MA denies the characterization of the safety hazards caused by Fibertech. Verizon MA admits that after the Court's injunction entered against Fibertech, Verizon MA declined for a short time to allow Fibertech to perform additional, unsupervised work on its poles. In October of 2002, however, Verizon MA, WMECO and Fibertech entered into an agreement specifically authorizing Fibertech to re-span its cable under the supervision of the utilities. The purpose of the agreement was to fix some of the most serious safety hazards while allowing Fibertech to minimize its costs in doing so. A copy of that agreement is at App. Tab 5. Despite this express written authorization, Fibertech failed to re-span any of its cable, without informing Verizon MA that it had decided not to perform the work. Supplemental Leone Aff. ¶13.

14. Verizon MA lacks sufficient information either to admit or deny the allegations in this paragraph concerning the alleged survey conducted by Fibertech. Verizon MA denies that nearly half of its poles in the Springfield area contain safety hazards of the same serous nature as those created by Fibertech. Verizon MA denies the remaining allegations in this paragraph.

15. Verizon MA denies the allegations contained in this paragraph.

16. Verizon MA admits that the costs it and WMECO have incurred in correcting Fibertech's safety violations exceed $400,000, and that such costs are greater, in toto, than the original make-ready estimates. Verizon MA denies, however, that this work was unnecessary. Fibertech's conduct in attaching its facilities in a slip-shod, fly-by-night manner, without authority and before make-ready work could be performed, drastically increased the cost of bringing the subject poles into compliance with the relevant construction standards. For example, Verizon MA incurred significant engineering costs simply in trying to identify the poles on which Fibertech had attached without a license and surveying those poles for post-construction defects. Likewise, Fibertech frequently attached its cable at an improper location on the pole, sometimes creating mid-span crossovers. Those attachments had to be re-placed. Fibertech also ruined some poles by drilling through-holes too close to pre-existing holes, necessitating the replacement of the poles. Filed herewith as App. Tab 6 is a copy of the Make-Safe Accounting Verizon MA has provided to Fibertech, showing the additional costs Verizon MA has incurred to date – over and above its original make-ready estimates – to remedy Fibertech's safety violations.

17. Verizon MA admits that it has terminated Fibertech's Aerial License Agreements, on account of Fibertech's willful and intentional breaches thereof and failure to cure. Rather than engaging in self help, however, Verizon has brought the issue of the termination of the agreements to the court, by seeking declaratory judgments that Fibertech has breached the Agreements and Verizon MA has terminated them.

18. Verizon MA denies the allegations in this paragraph, with the exception of the final sentence. Verizon MA agrees that "strict enforcement of rules pertaining to pole and conduit licensing practices" are necessary to further competition. Those rules are set forth in

the Aerial License Agreements, which Fibertech agreed to years ago. Fibertech is the chief violator of those rules and by far the most recalcitrant. Those rules must be enforced, until and unless modified by agreement of the parties or a decision of the Department. Thus, if Fibertech was unhappy with the rules, it should have brought a proceeding before the Department before it attached unlawfully. By its illegal, unilateral conduct Fibertech has sought to create its own set of rules, favoring itself over other pole attachers.

19. Verizon MA lacks sufficient information either to admit or deny Fibertech's allegations concerning its corporate structure or its business plans. Verizon MA denies, however, that Fibertech provides telecommunications services. Verizon MA understands that Fibertech has filed with the Department a Statement of Business Operations and a tariff.

20. Verizon MA admits that it is an Incumbent Local Exchange Carrier as that term is defined in the Telecommunications Act of 1996 and has a principal place of business at 185 Franklin Street in Boston. Verizon MA provides a range of telecommunications services to customers throughout Massachusetts, including in the Springfield metropolitan area.

21. This paragraph of the Complaint is addressed to WMECO and a response by Verizon MA is unnecessary.

22. This paragraph of the Complaint is addressed to MECO and a response by Verizon MA is unnecessary.

23. This paragraph of the Complaint is addressed to WMECO and a response by Verizon MA is unnecessary.

24. This paragraph of the Complaint is addressed to MECO and a response by Verizon MA is unnecessary.

25. Verizon MA admits that it is subject to the provisions of G.L. c. 166, § 25A and 220 CMR 45.00.

26. Verizon MA admits that it owns poles and conduits to which Fibertech has sought to attach its fiber cables.

27. This paragraph of the Complaint sets forth legal conclusions to which a further response is unnecessary.

28. Verizon MA admits that Fibertech has filed applications with Verizon MA for access to specified poles and conduit in Massachusetts. Verizon MA has licensed Fibertech to attach to approximately 3,500 poles and 71,000 feet of conduit in Massachusetts. Supplemental Leone Aff. ¶6.

29. This paragraph of the Complaint sets forth a legal conclusion to which further response is unnecessary.

30. Verizon MA admits that it entered into an Aerial License Agreement with Fibertech on or about March 7, 2000, and that the document contained in Exhibit B of the Complaint is a copy of that agreement. Verizon MA also admits that it entered into a Conduit License Agreement with Fibertech on or about June 6, 2000, and that the document contained in Exhibit C of the Complaint is a copy of that agreement. Verizon MA further admits that Fibertech began requesting access to Verizon MA's poles and conduits pursuant to these agreements in 2000.

31. Verizon MA admits that Fibertech entered into an Aerial License Agreement with Verizon MA and WMECO on or about March 31, 2000, and that the document contained in Exhibit D of the Complaint is a copy of that agreement. Verizon MA also

admits that Fibertech began requesting access to Verizon MA's poles and conduits pursuant to this agreement in 2000.

32. This paragraph of the Complaint is addressed to MECO and a response by Verizon MA is unnecessary.

33. The Department regulations cited in this paragraph of the Complaint speak for themselves and further response is unnecessary. In addition, the Verizon MA pleading cited in the paragraph speaks for itself and further response is unnecessary.

34. Verizon MA denies the allegations contained in this paragraph. Fibertech fails to identify the applications it alleges it submitted on July 17, 2000, making it difficult for Verizon MA to respond to this allegation. Verizon MA states that Fibertech first attempted to file such applications in June of 2000, when it filed papers purporting to be twenty-six (26) pole attachment license applications. Those papers included certain subsidiary forms required to be submitted with applications under the License Agreements, but they were incomplete and did not include the official application form, form A-1, required by the Agreements. Verizon MA notified Fibertech of these deficiencies (in greater detail) one day after receiving the papers, and explained the forms and other information that Fibertech needed to file. A month later, Fibertech filed the forms A-1 for these applications. Although Verizon MA continued to assist Fibertech to complete its applications, Fibertech did not provide sufficient information to allow Verizon MA to proceed on the applications until in or about late September, 2000. Within days, Verizon had issued to Fibertech its estimates of the costs of performing make-ready surveys on the poles covered by these applications. *See* Supplemental Leone Aff. ¶7.

Fibertech, however, continued to delay progress on these applications for months by failing to provide accurate information regarding its applications, failing to provide field note-takers so that make-ready surveys could be performed timely, failing to object to field survey decisions in a timely way, by filing applications for poles in several municipalities, by revising the routes it wished to take and by requesting that applications be put on hold for weeks or months on end. In some cases, Verizon MA field note-takers discovered – while performing the make-ready surveys – that Fibertech had omitted on its applications a number of poles on the desired route, and had to amend the application in the field. In effect, Fibertech was using Verizon MA as an engineering firm to complete the design of its aerial routes in the Springfield area. *See* Supplemental Leone Affidavit, ¶8.

Verizon MA admits that Fibertech often filed applications only to cancel them later, often after Verizon MA had performed make-ready surveys. Verizon MA denies that it caused delays in processing license applications from Fibertech. Verizon MA lacks sufficient information either to admit or deny the remaining allegations in this paragraph, which are addressed to or concern other Respondents.

In response to Note 6 of the Complaint, Verizon MA denies that it has "created an additional step in the licensing process" by issuing a customized estimate of the cost of each make-ready survey, rather than allow Fibertech to pay a flat fee for the survey at the time of application. Moreover, Fibertech knows its claim is false. In August of 2001, Verizon MA offered Fibertech a new Aerial License Agreement which, in addition to other improvements streamlining the licensing process, provides for just such a flat survey rate, to be paid with the application. Though most of Verizon MA's licensees make use of this feature, Fibertech

refused to sign the new agreement. Thus, Fibertech has intentionally elected not to avail itself of this time-saving service. *Id*. ¶9.

35. Verizon MA denies the allegations contained in this paragraph of the Complaint. Further answering, Verizon MA denies that the Exhibit F to the Complaint accurately lists all of the poles to which Fibertech has attached in the Springfield area. Verizon MA also denies that Exhibit G contains a complete set of the applications Fibertech filed for poles in the Springfield area or Verizon MA's responses to such applications. As one example only, Exhibit G fails to include Fibertech's applications #SPR C-2-2 and #SPR D-6-1, for poles which Fibertech later attached to illegally. It also fails to include Fibertech's application #SPR D-5-5, which Verizon MA granted.[5]

36. See Response to paragraph 5 of the Complaint.

37. See Response to paragraph 9 of the Complaint.

38. Verizon denies the allegations contained in this paragraph. Verizon has not withheld any information requested by Fibertech regarding availability of conduit. Moreover, as detailed in response to paragraph 9, above, Fibertech itself chose to apply for conduit in bits and pieces, so that its applications were subject to cancellation if the requested conduit was not available. Fibertech could have, but declined, to ask Verizon MA to plan conduit routes for Fibertech. Verizon MA's policy is designed to ensure fair and reasonable access to conduit to all licensees. Fibertech essentially wishes to give itself the right to reserve conduit without payment. Fairness and the interests of other applicants to use scarce

[5] Fibertech alleges that it attached to between 767 and 772 poles in the Springfield area on June 20 and 21, 2002. *See* Complaint ¶¶35 and 63. Verizon MA's records indicate that Fibertech attached to only 704 poles, including 46 pursuant to licenses and 658 illegally without a license. Until it filed this Complaint, Fibertech had never identified for Verizon MA the poles to which it has attached in the Springfield area, and Verizon is investigating Fibertech's current figures.

conduit space, however, require Verizon to impose reasonable time limits on Fibertech to decide whether to license conduit space, so as to make that space available to others if Fibertech declines. Verizon MA admits that it charges a search fee for conduit applications, and that it does so even if a prior search may have shown space available. The fee is required to perform a search, which is necessary to determine whether other conduit users have applied for or used that space in the meantime.

39. Verizon MA denies the allegations contained in this paragraph.

40. Verizon MA states that make-ready work on a pole is not necessary if the proposed attachment can be made in conformance with all relevant safety and construction standards as provided for in the Aerial License Agreements without such work. Verizon MA denies that it required Fibertech to construct its attachments to a higher standard than that provided in the Agreements, which standard Verizon MA applies to all pole applicants.

41. Verizon MA denies that it "frequently" employs boxing of poles. Verizon MA's construction standards prohibit boxing in most situations but do allow licensees to box poles that are already boxed or, upon prior application to Verizon MA, in extraordinary circumstances in which Verizon itself would box. Verizon and other phone companies allowed boxing years ago, but boxing makes poles much more expensive to replace and, in light of the increased use of its poles by many parties, Verizon no longer allows its use except in the limited circumstances above. Fibertech's insistence on boxing puts its own interests above those of future licensees (who would be forced to pay higher costs to replace poles boxed by Fibertech) so that Fibertech can save money now.

42. Verizon MA' rules on boxing apply equally to itself and all licensees. Verizon MA denies that its boxing rules are discriminatory.

43. Verizon MA denies the allegations contained in this paragraph.

44. Verizon MA admits that it exercises practicality, common sense and efficiency in its application of construction codes. Verizon denies, however, Fibertech's implication that Verizon MA knowingly allows wholesale non-compliance with such codes. Fibertech conflates two separate concepts – the construction standards Verizon MA requires applicants to meet and uses in determining what make-ready work may be necessary, versus the construction methods actually used by licensees to install their attachments. Verizon MA has neither the resources nor the obligation to perform post-construction inspections every time a licensee attaches to its poles.

45. Verizon MA denies the allegations contained in this paragraph. For much of the past three years, Fibertech has enjoyed as much if not more flexibility in enforcement of Verizon MA's licensing process rules and construction standards as other attachees. Verizon MA frequently allowed Fibertech to put applications "on hold" while Fibertech decided whether it wished to proceed and often performed surveys over and over again at Fibertech's request. Verizon MA has no doubt that a survey of Fibertech's entire plant in Massachusetts would reveal a large number of construction violations, which Verizon MA has not identified to date nor asked Fibertech to correct. However, the circumstances Fibertech created in Western Massachusetts are wholly different than mere "less-than-exact" code violations here and there. Fibertech installed miles of fiber on hundreds of poles illegally, without permission of Verizon MA or any other pole owner, in violation of G.L. c. 166, §35 and without the authority of the local municipalities. Fibertech used shoddy construction techniques for the sole purpose of getting its fiber up as fast as possible at the expense of safety and durability. As a result, Fibertech violated the relevant codes on pole after pole

after pole, creating a substantial risk of electrifying its lines and of dislocation off the poles in the event of a storm. Asking VZ to look the other way and ignore such gross violations of the Agreement and construction standards would obliterate the safety and construction standards in the Agreements.

Verizon MA denies the allegations contained in Note 12 of the Complaint. Verizon MA further states that, contrary to Fibertech's claim that its contractor was willing to re-span the unauthorized attachments, Verizon MA authorized and expected Fibertech to perform that work in October of 2002, but Fibertech failed to do so. *See* Response to paragraph 13, above.

46. Verizon MA denies the "steps" in determining make-ready work outlined by Fibertech but admits that in making such determinations, it seeks to use the most efficient make-ready methods possible consistent with proper construction standards.

47. Verizon MA denies the allegations contained in this paragraph.

48. Verizon MA denies the allegations contained in this paragraph.

49. Verizon MA denies that it demanded that Fibertech pay to replace poles that did not need to be replaced.

50. Verizon MA denies the allegations contained in this paragraph. Only two of the poles included on Fibertech's Exhibit I are poles which Verizon MA demands that Fibertech pay to replace -- pole #T6 on Earle Street and pole #T58 on Easthampton Road, both in Northampton. Fibertech ruined pole #6 on Earle Street by drilling a needless hole through the pole within four inches of another through hole. (Fibertech also disconnected a Verizon MA cable strap on this pole and used it for Fibertech's own attachment.)

Supplemental Leone Aff. ¶14. Moreover, Fibertech's Exhibit I includes poles (for example, poles #T4, 5, 12 and 15 on Earle Street in Northampton) which Verizon MA has agreed to replace at no charge to Fibertech. *Id*. Further answering, Verizon MA objects to Fibertech's attempt to "reserve the right" to allege at some future time that additional poles need not have been replaced. Whether Fibertech may split its claim in such a manner is governed by the rules against claim splitting, and Fibertech cannot avoid those rules by a reservation of rights.

51. Verizon MA denies the allegations contained in this paragraph of the Complaint. Further answering, Verizon MA denies that Fibertech's cable could have been accommodated on pole #58 on North Street in Agawam without replacing the pole. In fact, Verizon MA included in a make-ready estimate it provided to Fibertech the cost of transferring its facilities from this pole to a replacement pole, and Fibertech paid this estimate to Verizon MA before attaching to the pole unlawfully.

52. Verizon MA denies the allegations contained in this paragraph.

53. Verizon MA denies the allegations contained in this paragraph. In the hypothetical situation posed by Fibertech, the communications lines would have to be moved to make room for Fibertech, *even if those lines had been installed properly* (i.e. with 40 inches between the highest line and the power line). In other words, if Verizon MA had earlier discovered the violation and required the attacher to pay to correct the error, the highest communications line would be 40 inches from the power line. That line would still have to be moved to make room for Fibertech's facility. Thus, the presence of this particular pre-existing violation would not increase the cost of make-ready work to Fibertech. (There were some pre-existing violations on a few of the poles at issue which, due to their nature,

would have increased the make-ready cost to Fibertech. Verizon MA has not charged Fibertech for make-ready work on these poles.)

54. Verizon MA denies the allegations contained in this paragraph.

55. Verizon MA denies the allegations contained in the first sentence of this paragraph. Verizon MA admits that it has agreements with its joint pole owners defining the areas of the poles that may be used for electrical versus communications purposes and further admits that where the electric company's lines intrude into the communications space on a pole, the electric company is generally responsible for the cost of raising its lines. In fact, this situation occurred with respect to a small number of poles to which Fibertech had attached illegally. In those cases, Verizon MA did not charge Fibertech the cost of raising the electric company's facilities. Thus, Verizon MA denies that it fails to object to intrusions by the electric company into the communications space. Verizon MA denies that Exhibit J applies to all poles at issue in this proceeding or that it accurately represents the allocation of space on poles jointly owned by Verizon MA and WMECO. Verizon MA admits that it has declined to respond to Fibertech's informal attempt to obtain discovery regarding Verizon MA's pole space agreements with other companies. Verizon MA denies all remaining allegations contained in this paragraph.

56. Verizon MA denies the allegations contained in this paragraph of the Complaint. Further answering, Verizon MA states that after Fibertech installed its illegal attachments on pole 43 ½ on North Street in Agawam, WMECO agreed to rearrange its facilities on the pole, though it had no obligation to do so, in such a way as to eliminate the need to move the facilities of Verizon MA or the CATV company, resulting in reduced costs to Fibertech. *See* Supplemental Leone Aff. ¶15.

57. Verizon MA denies the allegations contained in this paragraph of the Complaint. Further answering, Verizon MA denies that Fibertech's Exhibit K accurately lists poles for which Verizon MA demands that Fibertech pay for make-ready work. For example, Exhibit K lists poles #17 and 21 on Conz Street in Northampton, yet Verizon MA has performed no make-ready work on those poles and none is necessary. The original make-ready estimates did include charges for these poles, because rearrangements of some prior attachments were necessary to accommodate Fibertech's request that it be allowed to attach below CATV. Fibertech apparently later decided to install its attachment *above* the CATV cable, however, obviating the need for make-ready work on these particular poles. Supplemental Leone Aff., ¶16.

Further answering, Verizon MA admits that it has charged Fibertech for make-ready work on poles on which there were pre-existing violations but only where, had the improper installations been installed properly, the make-ready work would still have been necessary to prepare the pole for Fibertech's attachment. Although an attacher who has caused a pre-existing violation can be charged to correct the problem, the Department's regulations at 220 CMR §45.03(3)(c), protect an attacher from being charged for the cost of moving its attachment to make room for a later attacher, such as Fibertech. Accordingly, Fibertech must pay for that make-ready work which would be necessary in the absence of the pre-existing violation. (Verizon MA notes that Fibertech itself, like all current pole users, is a beneficiary of this rule, in that if a licensee wishes to attach to a pole on which Fibertech has created a violation, Fibertech would not be required to pay to correct that violation if doing so would not alleviate the need to perform make-ready work on that pole.)

58. Verizon MA denies the allegations contained in this paragraph. As explained above, a licensee is required to pay for make-ready work (or to replace a pole) even on poles with pre-existing violations, where correction of the pre-existing violations alone would not prepare the pole for the new attachment. Verizon MA denies that Fibertech should not be responsible for paying the make-ready on the poles listed on Exhibit L. Verizon MA further notes that Exhibit L contains at least one pole, T58/E76 on Route 10 in Northampton, which is also included on Fibertech's Exhibit I. Verizon MA also states that Fibertech never even applied for a license for pole #5 on Conz Street in Northampton, Supplemental Leone Aff., at ¶17, and for that reason alone has no right to require any other attacher to pay for any work whatsoever on that pole.

59. *See* Response to paragraph 7.

60. *See* Response to paragraph 8.

61. Verizon MA denies the allegations contained in this paragraph.

62. *See* Response to paragraph 10.

63. Verizon MA admits that sometime in 2002, Fibertech installed attachments on approximately 700 of Verizon MA's poles in the greater Springfield area. For the reasons discussed above, Verizon MA denies that Fibertech had any right to install such attachments and further denies that Fibertech made such attachments in good faith or under color of right or law. As to the precise number of poles to which Fibertech attached, until the filing of the Complaint, Verizon MA had identified only 704 such poles (including 658 illegal attachments and 46 attachments pursuant to licenses issued by Verizon MA). Verizon MA is

investigating Fibertech's admission that it attached to an additional 63 poles on June 20 and 21, 2002.

64. *See* Response to paragraph 11. Paragraph 64 also contains statements of law which require no response. Further answering, Verizon MA states that it had informed Fibertech many times, before Fibertech installed its illegal attachments, that it was not allowed to use extension arms on Verizon MA poles. Rather than bring its disagreement to the Department for resolution, however, Fibertech elected to create its own rules for its own benefits and install its attachments as it saw fit. In addition, Fibertech is fully aware that the pole attachment complaint and enforcement procedures set forth in 220 CMR 45.00 *et seq*. provide a method to contest rates, terms or conditions regarding pole attachments. Thus, Verizon MA denies that Fibertech or any other attacher is faced with a "hard practical choice of succumbing to their unlawful make-ready demands or failing to install facilities for a prolonged" period.

65. *See* Response to paragraph 12.

66. Verizon MA admits that it notified Fibertech of its breaches of the Agreements and, in response to Fibertech's failure to admit culpability or take action to cure, served notice of termination of the agreements and then brought suit against Fibertech. Verizon MA denies, however, that it filed its suit before meeting with Fibertech in an effort to resolve the parties' differences. In fact, Fibertech alleged in its Petition of August 13, 2002, that there was such a meeting on July 17, 2002. *See also* Response to paragraph 12.

67. Verizon admits that the Superior Court held a hearing on its motion for preliminary injunction on August 14, 2002. Verizon MA denies the remaining allegations in this paragraph.

68. Verizon MA denies the allegations contained in this paragraph of the Complaint. Verizon MA further denies that it directed Fibertech to build any particular type of network and, as detailed above, denies that it prohibited Fibertech from re-sagging its lines.

69. Verizon MA states that the reasoning supporting the Superior Court's injunction is fully laid out in the August 19, 2002, order, which speaks for itself. Further answering, Verizon MA states that Fibertech later moved for reconsideration of the court's order, seeking to reduce substantially the amount of money to be deposited with Verizon MA. The court denied that request. Thus, when Fibertech was given more time to answer Verizon MA's allegations and the court had time to consider the issue, the court affirmed its original order and injunction.

70. Verizon MA admits the allegations contained in the first two sentences of this paragraph. The remaining allegations are directed to MECO and require no response from Verizon MA.

71. *See* Response to paragraph 14.

72. Verizon MA lacks sufficient information either to admit or deny the allegations contained in this paragraph of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Verizon MA has provided to Fibertech conduit and pole licenses pursuant to License Agreements that have been entered into in good faith by Verizon MA. Included in those

License Agreements are the rates, terms and conditions that have been agreed to by the parties. Massachusetts General Law c. 166, § 25A authorizes the Department to regulate the rates, terms and conditions applicable to attachments on the poles and in the conduits of a public utility in any case in which the utility and licensee fail to agree. The Department has not been granted authority to abrogate attachment agreements, such as the License Agreements, entered into in good faith.

THIRD AFFIRMATIVE DEFENSE

Fibertech is estopped obtaining any relief on the Complaint, in that Fibertech willingly entered into the License Agreements with Verizon MA.

FOURTH AFFIRMATIVE DEFENSE

Fibertech is barred from obtaining any relief on the Complaint pursuant to the doctrine of unclean hands, in that Fibertech installed attachments on the poles at issue here in bad faith, without right, without permission of the pole owners, in breach of the License Agreements, in trespass and in violation of G.L. c. 166, §35.

FIFTH AFFIRMATIVE DEFENSE

Fibertech by its conduct has waived any right to relief on the Complaint

SIXTH AFFIRMATIVE DEFENSE

The Department does not have authority to direct Verizon MA to issue written licenses nor direct Verizon MA to recognize the licensure of Fibertech's facilities on the poles in question.

SEVENTH AFFIRMATIVE DEFENSE

The Department should decline to grant any relief on the Complaint in the interests of enforcing the sound public policies of: (1) requiring parties to obtain a pole attachment

license before installing attachments on poles owned by others; and (2) requiring parties who dispute any rate, term or condition of pole attachment to bring such dispute to the Department or a court of competent jurisdiction rather than engaging in self help.

EIGHTH AFFIRMATIVE DEFENSE

The Complaint fails to plead its claims with sufficient particularity as required by the Department's regulations at 220 CMR §45.00 *et seq*.

NINTH AFFIRMATIVE DEFENSE

The Complaint seeks generalized relief which is not appropriate and cannot be granted in this pole attachment proceeding.

TENTH AFFIRMATIVE DEFENSE

Fibertech lacks standing to bring the claims alleged in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

The Department lacks jurisdiction to hear Fibertech's Complaint.

WHEREFORE, for the reasons set forth above, Verizon MA respectfully requests that the Department dismiss Fibertech's Complaint.

In the event that its Motion to Dismiss, filed herewith, is not granted in full, Verizon MA requests that the Department convene a hearing on this matter pursuant to 220 CMR §1.06.

Respectfully submitted,

VERIZON MASSACHUSETTS

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